IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.07.2007

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THE HONOURABLE MR.JUSTICE V. DHANAPALAN

W.P. No.7326 of 2003 & W.P.M.P. No.9447 of 2003

M. Gurunathan Petitioner

-Vs-

1 The Special Tribunal for Cooperative Cases
Vellore

2 The Deputy Registrar of Cooperative Societies
Vellore

3 Vellore District Central Cooperative Bank
represented by its Special Officer
Vellore Respondents

Writ Petition filed under Article 226 of The Constitution of India praying for issuance of a Writ of certiorari as stated therein.

For Petitioner Mr. Arumugam
for M/s. Aiyar & Dolia

For 2nd respondent Mr. A. Shanmugam, Govt. Advocate

For 3rd respondent Mr. Vijay Narayan, Senior Counsel
for Mr. R. Parthiban

ORDER

Questioning the legality of the order dated 26.09.2002 passed by the first respondent Tribunal in C.T.A. No.10 of 1995 in and by which the order dated 20.01.1995 passed by the second respondent in S.C. No.32/93-94 was confirmed, the petitioner has filed this writ petition.

2 The case of the petitioner, in nutshell, is as under:

The petitioner is an Assistant Manager in the third respondent Bank and his job includes passing of cheques, maintenance of accounts, etc. On 20.05.1989 (Saturday), the Branch Manager left at 2:30 p.m. and came back to office and after verifying the cash balance, signed in the register concerned and kept the cash in the cash chest along with the Cashier, who is the joint custodian

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of cash. On 22.05.1989 (Monday), when the cash safe was found open, the police investigated and found that a sum of Rs.4,35,000/- was missing. Consequently, surcharge proceedings were initiated against the petitioner, Branch Manager and Cashier on 31.12.1993 and the second respondent passed an order in the said surcharge proceedings on 20.01.1995 holding that all the three are responsible to make good the sum of Rs.4,35,000/-. In the appeal filed by these three before the first respondent Tribunal challenging the order of the second respondent, the order of the second respondent was confirmed. Aggrieved by the order of the first respondent Tribunal, petitioner alone has come out with the present writ petition .

3 The main contentions of Mr. Arumugam, learned counsel for the petitioner are that (i) the Branch Manager had not obtained prior approval from the Head Office to leave the Bank early and there was no instruction from the Head Office to the petitioner to act in the absence of the Branch Manager; and (ii) the second respondent who had issued the surcharge notice on 31.12.1993 ought to have completed the surcharge proceedings within six months from thereon as per the second proviso to Section 87 of the Tamil Nadu Cooperative Societies Act, 1983 (in short "the Act") and instead, it was completed only on 31.12.1994 and hence, the order passed by the first respondent Tribunal confirming the order of the second respondent, is liable to be quashed and the writ petition to be allowed.

4 In support of his contention that non-compliance of second proviso to Section 87 of the Act would attract quashing of the order passed by the first respondent Tribunal, the learned counsel for the petitioner has relied on a judgment of this Court reported in 2000 (II) CTC 659 in the matter of T.V. Ekambaram and two others vs. The Cooperative Tribunal cum District Judge, Madurai & 2 others in which para 6 reads as under:

> ". . .Under the circumstances, it has to held that the second proviso to Section 87 of the present Act of 1983 is mandatory in nature and the proviso also stated that the action "shall be" completed within a period of six months and if it exceeds beyond the period of six months, there must be an extension from the higher authority. As the second respondent has not obtained the extension from the higher authority, the action initiated has to be held to be non-est in the eye of law. The second respondent has not followed the second proviso to Section 87 (1) of the present Act of 1983 which is mandatory. As the impugned order has been passed without following second proviso to Section 87 of the Act of 1983, the same is quashed. . ."

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5 On his above contention, further reliance has been placed by the learned counsel for the petitioner on a judgment of this Court reported in 2003 (3) CTC 23 in the matter of Gabriel vs. The Deputy Registrar (Housing), Cuddalore and another in which the learned Single Judge, by relying on the judgment referred to above, has held that the second proviso to Section 87 is mandatory and holding so, has quashed the order impugned therein as a time-barred one.

6 Per contra, Mr. Vijay Narayan, learned Senior Counsel appearing for the third respondent Cooperative Bank has mainly argued on the point that Section 87 of the Act is only directory in nature and not mandatory and hence, non-compliance of the same will not lead to quashing of the orders of the first and second respondents. In support of this contention of his, he has placed reliance on:

i. the judgment of the Supreme Court reported in AIR 1965 SC 895 (V 52 C 141) in the case of Raza Buland Sugar Co. Ltd. vs. The Municipal Board, Rampur (para 7)

> "The question whether a particular provision of a statute which on the fact of it appears mandatory - inasmuch as it uses the word "shall" as in the present case - or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose, the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision , have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

ii. yet another judgment of the Supreme Court reported in (2004) 8 SCC 402 in the matter of U.P. State Electricity Board vs. Shiv Mohan Singh and another:

> "Now, coming to the question that the expression appearing in sub-section (4) of Section 4, "shall" should be interpreted as mandatory. It depends upon the context in which such expression appears. In order to

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interpret the word "shall" appearing in any enactment, one has to see the context in which it appears and the effect thereof. . . In that context, their Lordships referred to an earlier catena of decisions and observed: (SCC p.500)

> "Where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused. The Court cannot supply "casus omissus."

7 I have given careful consideration to the submissions made by the learned counsel for the parties and the judgments relied on by them in support of their arguments.

8 The points emerging for consideration in this petition are as to whether the first and second respondents are correct in fixing the responsibility on the petitioner also and whether the second proviso to Section 87 of the Act is mandatory or only directory.

9 Coming to the first point, it is seen from the records that only the Cashier has been stated to be the accused in the First Information Report on the file of the Vellore (South) Police Station. That apart, the Enquiry Officer, in his report, has categorically held that the Cashier alone is responsible for the loss of Rs.4.35 lakhs. Lastly, there is nothing on record to suggest that the petitioner was entrusted with the responsibility to safeguard the cash balance of the bank. It is also to be noted that the second respondent himself has very clearly held in paragraph 7 of his finding that the Cashier himself would have kept open the cash box a little open in order to make others believe as if there was a theft. Thus, in view of all these reasons, it has to be naturally held that the petitioner could not have been at fault and accordingly, the first point for consideration is answered in favour of the petitioner.

10 As regards the second point for consideration, it would be useful to refer to the provisos to Section 87 of the Act which read as under:

> "Provided that no action shall be commenced under this sub-section after the expiry of seven years from the date of any act or omission referred to in this sub-section;
>
> Provided further that the

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> action commenced under this sub-section shall be completed within a period of six months from the date of such commencement or such further period or periods as the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate."

11 Admittedly, in the instant case, the surcharge proceedings have not been completed within the time-frame nor approval of the higher authorities sought for extension of time to complete the surcharge proceedings, as mandated in the proviso extracted above. Of course, in the judgments of the Supreme Court relied on by the learned Senior Counsel for the third respondent Bank, though it has has been categorically held that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory, one should not lose sight of the fact that it has also been categorically held by the Supreme Court that it all depends on facts and circumstances of each case and no general principle or a strait-jacket formula can be laid down in this regard. Above all, what is to be borne in mind is the legislative intent and also the object and purpose of the Legislature.

12 In the case on hand, when the second proviso to Section 87 of the Act specifically mandates that surcharge proceedings have to be completed within a period of six months from the date of their commencement and extension of time for completion of such proceedings is subject to the approval of the higher authority, it is the bounden duty of the officer concerned to ensure that the surcharge proceedings are completed within the stipulated time and if not, genuine reasons for non-completion of the surcharge proceedings in time have to be assigned before the higher authority and his approval obtained for extension of time to complete the surcharge proceedings . Admittedly, when that is not the case here, I am afraid that the judgments of the Supreme Court relied on by the learned Senior Counsel cannot supplement his argument that the second proviso to Section 87 of the Act is only directory and not mandatory. Furthermore, the Acts which fell for consideration before the Supreme Court in the judgments relied on by the learned Senior Counsel for the third respondent Bank are the Apprentices Act, 1961 and the Uttar Pradesh Municipalities Act, (2 of 1916) and not the Tamil Nadu Cooperative Societies Act. Since law is settled that a function, whether to be called mandatory or directory, depends on the purport, object and the legislative intent of the Act, the rulings of the Supreme Court relied on by the learned Senior Counsel cannot be said to be applicable to the case on hand. Apart from this, this Court, on quite a few occasions, as relied on by the counsel for the petitioner, has categorically held that the second proviso to Section 87 of the Act is mandatory and has quashed the orders passed in violation of this Section. In such a view of the matter and taking into account the rulings of the Supreme Court

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which state that it is only the facts in each case which would determine as to whether a particular function is mandatory or directory, I am in complete agreement with the stand taken by the learned Single Judges of this Court that the second proviso to Section 87 of the Act is mandatory. Accordingly, since the third respondent Bank has failed in its endeavour in completing the surcharge proceedings within the stipulated time of six months, this Court quashes the order passed by the first respondent Tribunal confirming the order of the second respondent, insofar as the petitioner is concerned and the second point for consideration too is answered favouring the petitioner.

13 Before parting with the matter, I am to make it clear that I am conscious of the legislative intent of the Act and at the same time, as rightly argued by the learned Senior Counsel, it should also be borne in mind that the financial interest of the cooperative bank also has to be given its due regard. Just because there is no provision in the Act as to what will be the further course of action if surcharge proceedings are not completed within a period of six months from the date of its commencement and permission of the higher authorities not sought for extension, the cooperative bank cannot be made to bear the financial loss in view of the fact that such a loophole in the Act will defeat the very object of the Act. In that view of the matter and bearing in mind the consistent rulings of this Court in cases of this nature, this Court suggests the respondents to take every possible step to liaise with the authorities concerned in the State Government to bring out a suitable amendment in the Act as to what will be the further course of action in the event of the second proviso to Section 87 of the Act, not being complied with.

In the result, the writ petition stands allowed with the above suggestion for amendment of the Act. No costs. Consequently, connected W.P.M.P. is closed.

cad

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1 The Special Tribunal for Cooperative Cases, Vellore

2 The Deputy Registrar of Cooperative Societies, Vellore

3 The Special Officer
Vellore District Central Cooperative Bank, Vellore

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